



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

February 11, 2003

Mr. Steven D. Monté  
Criminal Law and Police Division  
City of Dallas  
2014 Main Street, Room 501  
Dallas, Texas 75201

OR2003-0932

Dear Mr. Monté:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#176300.

The Dallas Police Department (the "department") received a request from an applicant for a complete copy of her entire file, including psychological review and results, and background information. You have submitted for our review the questions and answers used in evaluating the applicant, the psychological evaluation of the applicant, and a background investigation summary of the applicant. We assume you have released to the requestor the remaining information responsive to the request. If the remaining responsive information has not yet been released, it must be released. Gov't Code §§ 552.301, .302. You ask whether the submitted information is excepted from disclosure under sections 552.111 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the release of a portion of the submitted information is governed by chapter 611 of the Health and Safety Code, which pertains to records created or maintained by a mental health professional. Section 611.002 reads in pertinent part as follows:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a), (b). Thus, the information is confidential with respect to the general public and may only be disclosed as provided by sections 611.004 and 611.0045. Section 611.0045 states in pertinent part:

- (a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.
- (b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.
- (c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient's physical, mental, or emotional health and shall include a copy of the written statement in the patient's records. The statement must specify the portion of the record to which access is denied, the reason for the denial, and the duration of the denial.

Health & Safety Code § 611.0045(a), (b), (c). In this instance, the requestor is the patient. Since the requestor is the "patient", section 611.0045(a) gives the requestor a right of access to the information we have marked, except as provided by other subsections of section 611.0045. *See Open Records Decision No. 565 at 3 (1990)* (upon written consent of subject, mental health records must be released). Section 611.0045(b) permits the professional to deny a patient access to any portion of that patient's mental health records if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health. Additionally, the above-quoted section 611.0045(c) establishes the procedure that a professional must follow when denying a patient access to the patient's own records.

Since chapter 611 of the Health and Safety Code requires the professional to consider the potential impact on the patient's health, the department must inform the professional of this request. The professional must make the determination required by the statute, and must state whether or not access is denied to part or all of the information we have marked. The professional must provide that decision in writing to the department. If the professional decides not to deny access, then all of the information we have marked must be released to the requester. If the professional denies access only to a portion of the information that we have marked, then the remainder of the marked information must be released. The department must not release any of the marked information until the professional's written answer is received. If the professional denies access to any portion of the marked information, the professional must also submit a written denial of access to the requestor as required by section 611.0045(c) of the Health and Safety Code.

Next, we note that the submitted information includes information made confidential by section 1703.306 of the Occupations Code which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We conclude that certain information was obtained from a polygraph examination. As the requestor is the examinee, the first exception in section 1703.306 applies. Accordingly, the department must release the polygraph information to the requestor pursuant to section 1703.306(a)(1) of the Occupations Code.

We also note the existence of criminal history record information that is generally protected under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also applies to information that is protected under the common-law right to privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Pursuant to *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), where an individual's criminal history information has been compiled or summarized by a governmental entity, the information takes on a character that implicates the individual's right of privacy in a manner that the same individual records in an uncompiled state do not. In this instance, we believe that the named individual's right to privacy has been implicated.

Additionally, the submitted information contains the requestor's social security number that may be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C.

§ 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). However, we note that section 552.023 of the Government Code gives a person a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. As *Reporters Committee* and the Social Security Act are intended to protect a person's privacy interest, and the requestor is a person whose privacy interest the department seeks to protect, you may not withhold the requestor's criminal history information or social security number from her. Therefore, the department must release to the requestor her own social security number and criminal history information.

We will now address your arguments with regard to the remaining information. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 615 at 5 (1993). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.); Open Records Decision No. 615 at 4-5 (1993). The information at issue here pertains solely to routine personnel matters such as reviewing the background information and checking the references of a job applicant. This information does not pertain to the "policymaking functions" of the department. Consequently, the remaining information does not come under the protection of section 552.111 and you may not withhold this information under section 552.111 of the Government Code.

You also claim that portions of the submitted information are excepted from disclosure under section 552.122. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). The term "test item" does not encompass the information at issue as it consists of questions and answers used to evaluate the applicant's overall suitability for the position. Thus the information may not be

withheld under section 552.122. Because you have raised no other exceptions to required public disclosure, and we are aware of none, the department must release the remaining information.

In summary, we have marked the information that is covered by chapter 611 of the Health and Safety Code. The department must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Heather Ross".

Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/sdk

Ref: ID# 176300

Enc: Submitted documents

c: Ms. Naomi Newcomb  
1010 West Live Oak Street  
Durant, Oklahoma 74701  
(w/o enclosures)